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IN THE

Supreme Court of the United States

October Term, 1951.

No. 140

ALABAMA MARBLE COMPANY, a Corporation,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR ALABAMA MARBLE COMPANY, A CORPORATION, Petitioner.

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No. 140

ERRATA

REPLY BRIEF FOR ALABAMA MARBLE COMPANY

A CORPORATION, Petitioner

p. 3 - line 3, delete last 3 words therein, namely: "and their defense".

p. 3 - line 4, delete first 6 words therein, namely: "of fellow workers and the Petitioner".

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ALABAMA MARBLE COMPANY, a Corporation,
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NATIONAL LABOR RELATIONS BOARD,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR ALABAMA MARBLE COMPANY, A CORPORATION, Petitioner.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

THE DISCHARGES.

THE BOARD FOUND that Adair, Wilson, Adams and Kinser were discharged by Petitioner because of their *union and concerted activities* (BRIEF FOR BOARD, p. 9). However, the Board has not informed this Court that such finding or conclusion is contrary to the understanding and reasons given by the Union and the Petitioner as such appear from the evidence on the record considered as a whole.

THE UNION MAINTAINED that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine hand-polishers and leave one out" (ABR. 95).[1] Also, the Union consistently and repeatedly affirmed that the work stoppage (strike) on Monday, October 6, 1947, was not authorized by the Union and that the Union was not responsible for it (ABR. 86, 100, 106, 35, 21).[2]

PETITIONER MAINTAINED that for good cause it discharged Adair, Wilson, Adams and Kinser, name-

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[1] "ABR." refers to the certified APPENDIX TO BRIEF FOR RESPONDENT filed herein. "R." refers to the certified TRANSCRIPT OF RECORD filed herein.

[2] The work stoppage was unilateral action but not that of the Petitioner. The employee status of Adair, Wilson, Adams and Kinser was not automatically severed because of their misconduct on Monday, October 6, 1947. Affirmative action by the Petitioner was required. *Dorsey Trailers, Inc.*, 80 N. L. R. B. No. 89, R. 149. Such action, which was timely, occurred on October 16, 1947, when Petitioner discharged them because of their misconduct. They have not been "reemployed" within the meaning of Section 8 (d) of the Act.

ly, for their flagrant misconduct, their gross insubordination, their gross disregard for the welfare of fellow workers and the Petitioner, and their defense of fellow workers and the Petitioner, and their defiance of the Petitioner (See PETITION FOR WRIT OF CERTIORARI, pp. 9, 10). Petitioner considered Adair, Wilson, Adams and Kinser to be in the same category as Ellison, one of the discharged handpolishers (ABR. 190). Petitioner stated its position (ABR. 157-158) to the Union at the evening meeting on October 15, 1947, (ABR. 152-159), namely, that Petitioner no longer wanted as an employee any man "who is so indifferent to the interests of the men or the company" (ABR. 157). On the same occasion Petitioner told the Union that Ellison "*together with other individuals*" (ABR. 157) had "interfered with the affairs and business of the company without authority" (ABR. 157), that such "does warrant us (Petitioner) in discharging" (ABR. 158) them.

It is indeed remarkable, fantastic, unrealistic and legally untenable to credit the Board with knowing more about the real reason for the discharge of the four individual employees than either the Union or the Petitioner. The burden was upon the Board to affirmatively and by substantial evidence prove its charges that Petitioner violated Sections 8(a) (1) and (3) of the Act. *N. L. R. B. v. Reynolds International Pen Co.*, 7 C. C. A., 1947, 162 F. 2d. 680, *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 5 C. C. A., 1941, 122 F. 2d. 433. It is submitted that, as a matter of law, the substantial evidence on the record considered as a whole

does not permit, warrant, or support the finding or conclusion of the Board that Adair, Wilson, Adams and Kinser were discharged by the Petitioner because of their union and concerted activities.

PETITIONER'S MOTIVATION.

Further, Petitioner submits that, as a matter of law, the substantial evidence on the record considered as a whole affirmatively proves that Petitioner discharged Adair, Wilson, Adams and Kinser for good cause within the meaning of Section 10(c) of the Act.[3] The Trial Examiner affirmatively found that there was no *anti-union animus* which motivated the Petitioner to discharge Adair, Wilson, Adams and Kinser.

> "The respondent (Petitioner herein) as of October 6, (1947) had not committed an unfair labor practice." (INTERMEDIATE REPORT, R. 149.)

> "While the union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the union's position at the bargaining table, *to destroy its majority,* or to avoid the respondent's obligation to bargain." (Emphasis supplied.) (INTERMEDIATE REPORT, R. 173.)

Because of the absence of such *anti-union animus* it was fatal error to hold that Petitioner violated either Section 8(a) (1) or (3) of the Act. The question as to

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[3] BRIEF FOR BOARD admits that Petitioner had cause for discharging Adair, Wilson, Adams and Kinser but erroneously finds or concludes that Petitioner condoned their misconduct. This same misconduct is then mystically "found or concluded" by the Board to be "union and concerted activities." This Court should not sanction or encourage the Board in its effort to use the expressions "finding or conclusion" as though they were "Aladdin's lamp" to be employed to suit the convenience of the Board.

proper discipline is a matter for the decision of the management in its discretion. *Wyamn-Gordon Co. v. N. L. R. B.*, C. C. A. 8, 153 F. 2d. 408, *N. L. R. B. v. Montgomery Ward & Co., Inc.*, C. C. A. 8, 157 F. 2d. 486. An employer may discharge an employee for any cause that seems to be proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible. *Associated Press v. N. L. R. B.*, 301 U. S. 103, 81 L. Ed. 953. Membership in a union "gives no immunity" from discharge for cause. *N. L. R. B. v. Robbins Tire & Rubber Co.*, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, 161 F. 2d. 302. Conceding for the moment that Petitioner was mistaken in its belief that it had good cause for discharging Adair, Wilson, Adams and Kinser, it cannot be said that such discharges were motivated by an *anti-union animus* or that such discharges had the purpose or effect of discouraging union membership or any legitimate union activity. In *Underwood Machine Co.*, 74 N. L. R. B., No. 126, the Board held that unfair punishment is not necessarily discriminatory. Petitioner submits that it acted fairly, reasonably, and was justified in discharging the four individual employees on October 16, 1947, for their respective acts of misconduct on Monday, October 6, 1947.[4] Following

[4] The handpolishers were *not summarily* disciplined (PETITION FOR WRIT OF CERTIORARI, p. 5). Before discharging Adair, Wilson, Adams and Kinser, Petitioner investigated, deliberated, satisfied itself as to the guilt of the four individual complainants, and reached its decision to discipline them, for their misconduct. Such was timely action. (PETITION FOR WRIT OF CERTIORARI, pp. 8-10). If the Board is to be judged by its rashness in the case at bar, it is clear that the Board is opposed to considered, fair conduct and would encourage hasty, snap judgment, on the spot action without knowledge of the facts or circumstances, which would be contrary to good business practices and would foster industrial unrest rather than good and peaceful industrial relations, and, hence, not effectuate, but defeat, the purposes of the Act.

the discharges of Adair, Wilson, Adams and Kinser Petitioner's representatives met and bargained with union representatives at meetings held on the following dates in 1947, namely, September 17, September 26, October 22, October 30, November 6, November 28, December 23 (R. 154-155). Such precludes any finding or conclusion by the Board that Petitioner was acting from a desire to encourage or discourage union membership or to interfere with any activity declared permissible by the Act.

BOARD'S IMPROPER INTERFERENCE.

In the case at bar the Board has used its authority as a pretext for interference with Petitioner's right to discipline its employees for cause. This Court has held that such interference by the Board is not permitted by the Act. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 1937, 81 L. Ed. 893, 916, 301 U. S. 22, 45-46. The technique or means used by the Board is to say that it finds or concludes that, during the evening meeting on October 6, 1947, there was a "strike settlement agreement" regarding those who participated in the work stoppage which occurred during that day, that at the time of such meeting Petitioner, through its foremen, was aware of the identity of the strike leaders, that Petitioner did not at such meeting express any reservation regarding its right to investigate the events during the day on Monday, October 6, 1947, satisfy itself as to the guilt or innocence of its em-

ployees, and then take disciplinary action, and, finally, that Petitioner had condoned the misconduct of Adair, Wilson, Adams and Kinser and had lost its right to discipline them for their misconduct. Petitioner does not understand or believe the law now to be that by use of the terms "finding or conclusion" the Board now has authority to interfere with Petitioner's right, in the case at bar, to discharge Adair, Wilson, Adams and Kinser for their misconduct, which is the sole reason that motivated Petitioner to discharge them. Such would be contrary to *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 1937, 81 L. Ed. 893, 301 U. S. 22, *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. Ed. 627, *N. L. R. B. v. Union Pacific Stages*, 1938, C. C. A. 9, 99 F. 2d. 153, *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, *Standard Lime & Stone Co., v. N. L. R. B.*, 1938, C. C. A. 4, 97 F. 2d. 531, *N. L. R. B. v. Robbins Tire & Rubber Co.*, C. C. A. 5, 1941, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, C. C. A. 5, 1947, 161 F. 2d. 302.

THERE WAS NO STRIKE SETTLEMENT AGREEMENT.

The undisputed evidence on the record regarding the evening meeting on October 6, 1947, is found in the testimony of union representative Walter L. Mitchell [5]

[5] Mitchell testified that he was an organizer for the American Federation of Labor (ABR. 83), vice-president of his own international union (ABR. 99), and Southern Director for his international union (ABR. 99). Also, Mitchell testified that he had seven assistants over eight states (ABR. 98-99). Further, Mitchell testified that he handled for the union the negotiations that resulted in the existing contract between the Petitioner and Union (ABR. 84).

(ABR. 86-88) and Petitioner's Assistant General Manager King [6] (ABR. 177-180, 182, 201-204). Petitioner contends that, as a matter of law, the substantial evidence on the record considered as a whole does not permit, support, or warrant the finding or conclusion of the Board that there was a "strike settlement agreement" regarding those who participated in the work stoppage which occurred on Monday, October 6, 1947. When Mitchell attended this meeting he told King that he "did not know the circumstances or details of it (work stoppage, October 6, 1947) yet, and had not made an investigation, but that the Union would live up to its contract—that it was not a Union strike—that the Union would live up to its contract and order them (the men) back to work—" (ABR. 86). King expressed his resentment (ABR. 178) and such closed the discussion regarding the one day work stoppage.

As a matter of law, there was no "strike settlement agreement." [7] Mitchell informed Petitioner's representatives that he didn't know the circumstances or details of the work stoppage and had not made an investigation. Mitchell denied that it was a Union strike, recognized the Union's contractual obligation, stated

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[6] Mr. H. M. King, Petitioner's Assistant General Manager, handled the contract negotiations for the Petitioner (ABR. 100). Mitchell testified that King told him that he (King) "did not know anything about unions." (ABR. 100.) Mitchell was the expert. King was the beginner.

[7] "Agreement" is defined in 3 *C. J. S.*, pp. 356-360. In 57 *C. J.* 531 "Settlement" is defined as follows: "Act or process of adjusting or determining; an adjusting: an adjustment between persons concerning their dealings or difficulties; an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other; arrangement of difficulties; composure of doubts or differences; determination by agreement; and liquidation."

that the Union would live up to the contract and order the men back to work, and in so doing there was no legal consideration for the return of the men to work the next morning, Tuesday, October 7, 1947. Petitioner's representative relied upon Mitchell's statements. King, who was the *only* person authorized to act for or bind Petitioner in such matter, knew nothing about the particular acts of misconduct of Adair, Wilson, Adams, and Kinser when he met with representatives of the Union. Without such knowledge neither Mitchell nor King was in a position to reach an agreement regarding the events of Monday, October 6, 1947, and it is not reasonable or proper to infer that either intended to reach an agreement regarding the one day work stoppage, as distinguished from the matter concerning the discharge of the nine handpolishers.

It is undisputed that Mitchell was called to come to Petitioner's plant because of the discharge of the nine handpolishers. It is clear that the evening meeting on October 6, 1947, was for the purpose of handling the discharges of the nine handpolishers which occurred before the commencement of work on Monday, October 6, 1947. In his effort to persuade King to reemploy the nine handpolishers Mitchell said: "he felt that all of them should be lectured and reprimanded". (ABR. 178.) King told Mitchell: "No." (ABR. 178.) Mitchell then propositioned (ABR. 87) King as to whether he would permit the handpolishers to go back to work the next morning. King said: "No, they were fired and they will stay fired" (ABR. 178). Mitchell then *asked* if the other men could go back

to work the next morning and King *said* "they could" (ABR. 178).[8] Henry Douglas Robinson, a union committeeman who was called as a witness by the Board was asked about this meeting:

"Q. What was discussed at the meeting?" (ABR. 27.)

"A. The discharge of those nine men." (ABR. 27.)

W. A. Adams, one of the individual complainants, was questioned by Trial Examiner Feiler regarding the same meeting (ABR. 81-82). The questions and answers were as follows:

"Trial Examiner Feiler:

"Now. Do you remember attending the meeting on the night of October 6th?

"The Witness:

"Yes.

"Trial Examiner Feiler:

"And do you remember your testimony about discussions between Walter Mitchell and Mr. King?

"The Witness:

"Yes.

"Trial Examiner Feiler:

"*And it concerned the nine handpolishers; is that right?* (Emphasis supplied.) Witness nodded affirmatively.

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[8] Petitioner did not *invite* the men to return to work. Yet the Board would have this Court believe that Petitioner *invited* the men to return. Such is not an honest, fair, reasonable, permissible inference from the substantial evidence on the record considered as a whole. The truth is that Petitioner *permitted* the men to return to work as it was required to do by Section 1(c) of the existing collective bargaining agreement (ABR. 211-212) and Section 8(d) of the Act. Also, see *National Electric Products Corp.*, 80 N. L. R. B. 995.

"Trial Examiner Feiler:

"Were you in the meeting from the beginning until its end?

"The Witness:

"Yes, sir."

PETITIONER WRONGLY CHARGED WITH KNOWLEDGE.

The undisputed evidence on the record is that King was Petitioner's representative to whom all grievances had been and were to be presented (ABR. 29-30, 77-78, 102-103); that the custom and practice was to contact King and arrange for a meeting (ABR. 77-78); that the union admitted it should have contacted King but did not (ABR. 33, 102-103); that Petitioner's business was and is departmentalized, that particular foremen were in charge of particular departments and only had authority over employees in the particular departments over which they were foremen (ABR. 212-214, which recites Article 5 of the contract); that Petitioner's foremen "could on their own responsibility fire a man for insubordination, that is, flatly refusing to obey orders, and then in the case of a foreman being cursed out by a man under him" (ABR. 200, 201-202); that *only* King handled all other matters requiring disciplinary action (ABR. 200, 201-202, R. 272-284). Because of such circumstances Petitioner contends that, as a matter of law, it was fatal error to impute to the Petitioner any knowledge that Petitioner's foremen might have had regarding the misconduct or activities of Adair, Wilson, Adams and Kinser on October 6, 1947. This Court's attention is

called to the fact that the Trial Examiner did not find as a fact or conclude as a matter of law, that Petitioner's foremen had knowledge of the role played by Adair, Wilson, Adams and Kinser and did not impute or attribute to Petitioner any knowledge on the part of its foremen (R. 135-221; See particularly 142-151). Such finding or conclusion appeared for the first time in the Board's decision and order dated June 6, 1949 (R. 125-132) and is not supported by the substantial evidence on the record considered as a whole. The undisputed evidence is that George M. Warren was Adair's foreman (ABR. 22), that Warren was in his office at the north end of the finishing plant (ABR. 63, 64) and did not know of the misconduct or role played by Adair, Wilson, Adams or Kinser on Monday, October 6, 1947 (R. 272-275). However, without any legal or factual basis the Board finds or concludes that Warren had knowledge of Adair's activities and imputes such knowledge to the Petitioner. Such is fatal error. Even more fantastic is the Board's finding or conclusion that Willis E. Sorrell, foreman of the sawmill department, under whose supervision complainant W. A. Wilson worked (R. 275-277), had knowledge of the role played by Wilson Monday morning October 6, 1947. The record affirmatively shows that Sorrell, because of illness, was not at the plant and did not report for work until about 7:40 a. m. or 7:45 a. m., which was after the complete work stoppage occurred or was effected on Monday, October 6, 1947 (R. 276). Petitioner requested the Board to ascertain the facts but, as might now be expected, the Board refused to ascertain the facts (R. 258-286). The Board has

ignored the undisputed fact that E. I. Dison, foreman over the coping and rubbing bed departments (ABR. 129) had no authority over Adair (R. 278) and could not discipline or recommend the disciplining of Adair. However, the Board erroneously imputed to the Petitioner Dison's knowledge of Adair's conduct on Monday, October 6, 1947, namely, the fact that Adair ordered Dison to shut down the rubbing beds which were operated by Negroes (ABR. 225). W. C. (Bill) Kinser, who was a sub-foreman at the quarry and supervised complainants Adams and Cecil M. Kinser (ABR. 44, 71, 122), did not hear or see his brother, Cecil M. Kinser, or W. A. Adams call or motion the men to come out of either the north or south end of the quarry (ABR. 183). Foreman, Kinser did hear his brother, Cecil M. Kinser, tell Adams to call out the men from the south end of the quarry (ABR. 122-123) and heard his brother, Cecil M. Kinser, tell the men to clock out and go to Petitioner's finishing plant located about a half mile away (ABR. 124). Such is only piecemeal information and was not communicated by W. C. (Bill) Kinser to Petitioner's Assistant General Manager King, who was the *only* person to handle such matter, until the latter part of the week in which the work stoppage occurred on Monday, October 6, 1947. (ABR. 124-125, 183, 203-204.) Fatal error was committed in imputing such knoweldge to the Petitioner.[9]

[9] King was entitled to *all* of the facts. Competent managers (and King was one, otherwise he would not have been Petitioner's Assistant General Manager in charge of production and production personnel) "do not formulate personnel policies nor resolve disputes . . . on the basis of a hurried or partial statement of one side of the controversy." *Compania Constructora Bechtel-McCone, S. A., McDonald*, 9 C. C. A., 1946, 157 F. 2d 749, 752.

PETITIONER NOT REQUIRED TO RESERVE RIGHT TO DISCIPLINE.

In the brief submitted on behalf of the Board no authority is cited to support the Board's legal conclusion that Petitioner, at the evening meeting on October 6, 1947, was, as a matter of law required to express some reservation as to the return of all the strikers in order to be able to later discipline any participants therein for misconduct. Petitioner knows no such authority and does not believe that any such authority exists. Such is not required by Section 8 (d) of the Act or the common law principles of condonation or waiver. The right of an employer to discharge an employee for cause is the same regardless of whether the employee is a member of or officer in a union. *N. L. R. B. v. Robbins Tire & Rubber Co.*, C. C. A. 5, 1947, 161 F. 2d. 798, *N. L. R. B. v. Continental Pipe Line Co.*, 161 F. 2d. 302. Here the Board, without authority, has found or concluded contrary to the common law principles of condonation or waiver (See PETITION FOR WRIT OF CERTIORARI, p. 30). This Court's attention is called to the common law principle that, an employer, after knowledge that an employee has breached his contract of employment, may continue to accept his services, take a reasonable time in which to investigate and fully satisfy himself as to the guilt of such employee before taking any disciplinary action, i.e., waiting a reasonable time before acting will not amount to a waiver of the employer's right to discipline or a condonation of the offense committed by the employee. 18 R. C. L., Sec.

27, p. 517, *Gordon v. Dickinson,* 100 W. Va. 490, 137 S. E. 65, 44 A. L. R. 526. Petitioner contends that the common law principles of condonation or waiver have not been changed, altered or amended by the Act or Section 8(d) thereof. It is urgent and necessary that this Court rule upon such question. The substantial evidence on the record considered as a whole regarding the evening meeting on Monday, October 6, 1947, is not in conflict. Hence, whether or not there was condonation or waiver by Petitioner is an issue of law which should now be settled by this Court.

NATIONAL ELECTRIC PRODUCTS CORP.

Petitioner now calls the Court's attention to footnote 14 on pages 13 and 14 of the BRIEF FOR BOARD. There the Board tries to distinguish *National Electric Products Corp.*, 80 N. L. R. B. 995, from the case at bar. From the foregoing it is clear that the Board's attempted distinction is not valid.[10] In the case at bar there was no negotiated strike settlement agreement regarding those who participated in the work stoppage that occurred on October 6, 1947; nor did Petitioner invite its employees back to work, the fact being that they returned to work voluntarily and without any inducement from Petitioner, nor, as a matter of law, was Petitioner, at such meeting, required to reserve its right to discipline, at a later date,

[10] Petitioner submits that here the Board wants to sidetrack *National Electric Products Corp.*, which is determinative of the issues in the case at bar, because it is favorable to the Petitioner.

anyone found guilty of misconduct in connection with the events of Monday, October 6, 1947.

In The Matter of National Electric Products Corp., decided December 1, 1948, 80 N. L. R. B. 995, the effective collective bargaining agreement contained substantially the same no strike, no lock-out, and grievance procedure provisions (page 999) as found in the contract between Petitioner and the Union (ABR. 211-214). There the company discharged an individual named Marfia and such was an unfair labor practice (here Petitioner has no record of *anti-union animus* or previous or subsequent unfair labor practices). Following Marfia's discharge, he and five other employees engaged in peaceful picketing which induced some 300 employees, out of the 1200 on the day shift, to remain away from work. "2 or 3 of the 5 picketers were picketing on their own time *and worked their regular shift that afternoon; the others remained away from work in order to picket. The following week,* each of the *picketers was suspended by the Respondent* for a few days *as a penalty for the picketing.*" (Emphasis supplied.) The Board held that the company had committed no violation of Section 8(a) (1) and (3) of the Act, and dismissed the allegations of the complaint charging such violations (page 1101). The following pertinent language is found in the decision of the Board:

> "We are convinced that the concerted activity of the 5 complainants, who engaged in or induced the strike in protest against Marfia's discharge, was violative of the agreement, and, that, in accordance with

the established precedent, the respondent was privileged to discipline them for their wrongful action." (Page 999.)

"However, the (page 999) Respondent's conduct, although regrettable, does not, in our opinion, excuse the complainants' breach of their agreement. *The Act was designed to encourage collective bargaining as a substitute for strike action. The right to strike,* although protected by the Act, *may be waived by the employees* in an agreement concluded through the collective bargaining process. Thus, in our opinion there is no basis for the conclusion of our dissenting colleague that we have deprived the employees 'of a basic right' to strike, since the employees themselves waived their right to strike during the life of the agreement. As we have heretofore emphasized, *'no strike' clauses, like the one herein, are designed to forestall the use of even permissive economic weapons and to substitute settlement by collective bargaining, and tend to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare. (Matter of Singer Manufacturing Company,* 24 N. L. R. B. 444, 467.) No convincing argument has been made as to how it would effectuate the expressed purposes of the Act to regard this employer's unfair labor practice as sufficient justification for overriding the *salutary objective of a 'no strike' clause.* While it may be true that in the incident case it would have been futile for the employees involved to have invoked the grievance machinery of the contract with the respect to the discriminatory discharge of Marfia, their rights were nonetheless protected by the Act, *obviating any necessity for breaching their agreement.*

"Our order herein against the Respondent remedying the discriminatory discharge of Marfia *is adequate assurance to employees that within the framework of the Act they may adhere to their agreement and at the same time be fully protected against their employer's unfair labor practices.* In our opinion, under the circumstances here present, *the purposes of the Act can best be effectuated by requiring employees to honor their 'no-strike' commitments and rely on the remedial processes of the Board.*" (Page 1000.) (Italics supplied.)

Petitioner makes the following observations in connection with *National Electric Products Corp.:*

1. There the employer had first committed an unfair labor practice which was followed by picketing. In the case at bar Petitioner had committed no unfair labor practice.

2. There certain known picketers brought about a substantial work stoppage but the Board did not charge the company with knowledge of the identity of the picketers or their conduct. In the case at bar, the Board has erroneously found or concluded that Petitioner had knowledge of the identity of the individual complainants and their respective acts of misconduct on October 6, 1947.

3. There the Board held that the company's unfair labor practice was no excuse or justification for the workers or Union breaching their collective bargaining agreement. Had Petitioner discharged or

locked out all of its striking employees as the Board now suggests to this Court it might have done (See footnote 14 on pp. 13 and 14 of Brief for Board), the Board, relying upon its decision in *National Electric Products Corp.*, could have found or concluded that Petitioner was guilty of unfair labor practices for having violated its collective bargaining agreement with the Union, Section 8(d) of the Act, and, also, Sections 8(a) (1), (3) and (5) of the Act. Petitioner submits that under the circumstances it was justified in its course of action which resulted in the timely discharge of Adair, Wilson, Adams and Kinser after it knew *all* the facts, and satisfied itself that these four individuals had been guilty of misconduct detrimental to the welfare of their fellow employees and the Petitioner. *Comapnia Constructora Bechtel McCone, S. A. v. McDonald*, 9 C. C. A., 1946, 151 F. 2d. 749, PETITION FOR WRIT OF CERTIORARI, p. 30.

4. There the Board did not hold that permitting the picketers to return to work and permitting them to work into the following week constituted condonation or waiver by the employer so as to bar its right to later discipline such picketers. However, without any basis in fact or law, the Board holds that in the case at bar the fact that Petitioner's striking employees returned to work without Petitioner reserving the right to discipline at a later date the participants therein constituted condonation or waiver by Petitioner and cut off Petitioner's right to investigate, satisfy itself as to the guilt of any of its employees, and

then take disciplinary action against those guilty of misconduct.

5. There the Court recognized that the employees waived the right to strike, that no strike clauses have a salutary objective, that compliance therewith best effectuates the purposes of the Act. In the case at bar, the Board fails to recognize or to apply each such principle. There is no basis in fact or in law for such arbitrariness, bias and unreasonableness on the part of the Board against the Petitioner. Each such principle should have been applied and, had such principles been applied, the Board would have found in favor of the Petitioner. In not doing so fatal error has been committed.

UNION REFUSED TO ARBITRATE DISCHARGES.

In its brief filed herein the Board for the first time admits, as consistently maintained by Petitioner, that the Union failed, refused, or precluded the arbitration of the discharge of Adair, Wilson, Adams and Kinser, even though it was called upon several times by the Petitioner to proceed (See footnote 4, p. 7, BRIEF FOR THE N. L. R. B. in OPPOSITION, ABR. 161-165, 104-105). Adair, Wilson, Adams and Kinser, individually and collectively, were represented by the Union and bound by the acts of the Union as their agent. Failure or refusal to arbitrate their discharges, as required by the existing collective bar-

gaining ageement and Act, was both a valid defense for Petitioner and a ground which required the Board to find for the Petitioner and to substantiate Petitioner's respective motions to dismiss, separately and severally, the complaints respectively based upon charges filed in Cases Nos. 10-CA-86, 87, 88, 93, 185. (See paragraph 5 of amended answer, R. 60-65, and paragraph 5 of the answer, R. 66-67; also, INTERMEDIATE REPORT, R. 138-139.) The decision of the United States Court of Appeals, Fifth Circuit, granting the Board's petition for the enforcement of its order perpetuates such fatal error and should be reversed by this Court. To individuals and a Union, none of whom complied with their existing collective bargaining agreement or the applicable provisions of the Act, the decision of the Court below gives a cloak of immunity. Such does not encourage collective bargaining and does not effectuate the purposes of the Act. *National Electric Products Corp.*, 80 N. L. R. B. 995, *International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 69 Sup. Ct. 516, footnote 15, H. R., Rep. No. 510, 80th Cong., 1st Sess., p. 38.

BOARD'S COMPLAINT AGAINST PETITIONER BASED UPON CHARGES FILED BY UNION AND ADAIR, WILSON, ADAMS AND KINSER.

Board's brief states that "The complaint rests upon charges filed by the individual employees and not by the Union." See footnote 8, p. 11, of BRIEF FOR

THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION. This is contrary to the petition filed by the Board for the enforcement of its order (R. 1-7) and that which appears in the entire record in the Court below (R. 1-286).

The complaint issued by the Board in Case No. 10-CA-185 (R. 32-40) is based upon a charge (R. 47-49) and an amended charge (R. 29-32) filed by the Union and contains the same averments as found in the complaint (R. 22-28) based upon the charges of Adair, Wilson, Adams and Kinser (R. 13-22), *and* additional averments based upon the charges filed by the Union.

Petitioner moved to strike (R. 54-55) the averments regarding the Union (Para. IV, R. 24) found in the complaint based on the charges filed by Adair, Wilson, Adams and Kinser (R. 22-28). Erroneously this motion was overruled. Petitioner then answered the complaint in Cases Nos. 10-CA-86, 87, 88, 93 (R. 61) and the complaint in Case No. 10-CA-185 (R. 67) by averring that the Union had not complied with Sections 9(f), (g) and (h) of the *Labor Management Relations Act, 1947,* and demanded strict proof thereof (R. 61). During the entire hearing nothing was offered to show that the Union had complied with Sections 9(f), (g) and (h) of the *Labor Management Relations Act, 1947.* Because of this, and for other grounds, separately and severally, Petitioner, on several occasions moved to dismiss the complaints in all cases (10-CA-86, 87, 88, 93, 185) and these motions were denied. (R. 138-139.) Petitioner contends that Union's non-compliance with Sections 9(f), (g)

and (h) of Labor Management Relations Act, 1947, required the Trial Examiner, Board and Court below to sustain its motions to dismiss and, further, that the writ for certiorari should be granted to correct such fatal error. In addition, the Petitioner contends that the Court below erred in making any reference whatsoever to the Unions (International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers, and Terrazzo Workers Helpers, A. F. of L., and Local No. 133) in its decree enforcing the order of the Board (R. 301-304) and that such was fatal error and should now be corrected by this Court. *W. T. Rawleigh Co. v. N. L. R. B.*, 20 Commerce Clearing House Labor Cases, Paragraph 66,430. (This case does not appear yet in the official reporter.)

CASES CITED BY THE BOARD.

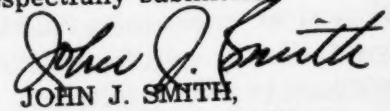
None of the cases cited in the BRIEF FOR THE BOARD have dealt with any factual situation comparable or analagous to that involved in the case at bar and, hence, are not applicable or controlling. In the Court below the Board relied almost wholly upon *National Labor Relations Board v. Aladdin Industries,* 125 F. 2d. 377 (C. A. 7), Certiorari denied, 316 U. S. 706, which is cited in footnote 11 on page 12 in BRIEF FOR THE BOARD. Petitioner submits that there was no issue of condonation or waiver before the Court in the *Aladdin* case. There the respondent's reasons for not reinstating the employees involved were as follows: A policy not to employ relatives in the same depart-

ment, incompetency, a rule not to employ married women and lack of available positions. The employer (respondent) therein did not assert that there was no strike settlement agreement and, further, did not assert its right to postpone discharge until it had fully satisfied itself as to the guilt of its employees. It follows that the part of the Court's opinion dealing with condonation or waiver is pure *dictum*. Therefore, the *Aladdin* case is no authority against the rights asserted by Petitioner in this case.

CONCLUSION.

For the reason stated in its petition and those stated hereinabove, Petitioner respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,



JOHN J. SMITH,
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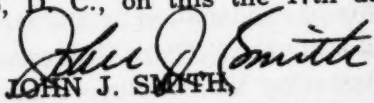
August, 1951.

This is to certify that five copies of this brief have been served on the Solicitor General, Department of Justice, Washington 25, D. C., on this the 17th day of August, 1951.



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